



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-13-00340-CV

ERIC DRAKE

APPELLANT

V.

CHASE BANK

APPELLEE

FROM THE 158TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 2013-20534-158

ORDER

I, Justice Bill Meier, hereby, on my own motion, voluntarily remove myself from further participation in this case. Oral argument occurred in this case on September 23, 2014. Attached as Exhibit "A" is a transcript of that oral argument. A memorandum opinion was handed down in this case dated November 20, 2014.

Appellant Eric Drake filed a motion entitled “Appellant Eric Drake’s Motion to Reconsider and Request for Hearing” on November 23, 2014. Appellant Eric Drake filed a motion entitled “Appellants’ Motion to Recuse and Disqualify Justice William Carl Meier” on December 1, 2014, in this court. Appellant Eric Drake filed a motion entitled “Appellant Eric Drake’s Second Motion Reconsider and Request for Hearing” on December 2, 2014. Without voting or ruling on any of these motions, and in order to expedite the adjudication of this appellate case, and before any further proceedings in this case, I voluntarily remove myself from all participation in this case. See Tex. R. App. P. 16.3(b). It is so ORDERED.

The clerk of this court is directed to transmit a copy of this order to the appellant and the attorney of record for the appellee.

SIGNED December 17, 2014.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: MCCOY, MEIER, and GABRIEL, JJ.

EXHIBIT "A"

TRANSCRIPT OF SEPTEMBER 23, 2014 ORAL ARGUMENT
IN CASE NO. 02-13-00340-CV
ERIC DRAKE V. CHASE BANK

JUSTICE MCCOY: WELCOME TO THE SECOND COURT OF APPEALS. WE HAVE FOUR CASES BEING SUBMITTED TODAY, THREE, I BELIEVE, THREE OF WHICH, NO, FOUR OF WHICH HAVE ORAL, NO, THREE OF WHICH HAVE ORAL ARGUMENT. THE PANEL TODAY CONSISTS OF MYSELF, ON MY RIGHT IS JUSTICE MEIER . . .

JUSTICE MEIER: GOOD MORNING.

. . . ON MY LEFT IS JUSTICE GABRIEL. AND THAT BEING SAID, WE WILL COMMENCE BY CALLING THE FIRST CASE.

CLERK: The court will now call Eric Drake versus Chase Bank. May it please the court, Mr. Eric Drake will argue his case. Mr. Gregg D. Stevens will argue for the appellee.

JUSTICE MCCOY: ALL RIGHT. LET'S PROCEED.

MR. DRAKE: Good morning, justices. I appreciate you taking the time to listen to a pro se litigant argue his first case before an appellate court. This case involved the appellant trying to get his credit straight. And he tried to get some attorneys to help him, but they worked for the other side, and he tried to file something himself. This case has two major points that I would like to bring to the court's attention. I am an indigent. I have what they call post-concussion syndrome, brain damage. I have about a three-hour span all day long to do what I'm doing now; and after that, it, it just goes down, I can't function very well at all. And I was accepted in the trial court as an indigent. I was accepted in this court as an indigent. And I have, when I filed my brief, I have cited many cases where that indigents, even this court has agreed, that have been accepted in the trial court and accepted in the appellate court, that they should not pay attorneys' fees. But then we have something new here called the 91a. And they say it's similar to a 12b motion in the federal statutes, but it's really not, because a 12b motion would allow an individual to go back in and to more fully draft out his pleadings, more direct. But there's no mandatory fees of attorney's fees at all of a 12b motion. A federal judge could do so, but there's no mandatory whatsoever. In this particular case, the 91a says that there is a mandatory—excuse me, your Honors—mandatory for, to have attorney's fees, but it does give an exception, and that is to governmental entities and a public official acting in

his or her capacity under the color of law. I don't think that when they were developing this 91a, that they considered an indigent person who also did not have the funds to file his filing fees in the trial court or the appellate court. I argue today, your Honors, that, you know, the 91a was developed without that conscious effort. But there's numerous cases that have been cited by the appellant here in his brief, in criminal courts, where that courts have said that if you were accepted in both, then you don't have to pay attorneys' fees. This case also looks at one other topic, and that is whether or not an order attained by fraud should be vacated. The attorneys on both sides—we have two major attorneys that's on the, on, on both sides of this case, and they had, they had submitted their attorneys' fees to the trial court. What was suspicious to me is that both of them, both amounts of money were almost practically the same, within a couple of hundred dollars. I felt like that that was not logical, in my opinion, because one attorney may work a little bit harder than another. Well, they told the trial court that "This 91a, we're not very familiar with it." In fact, the judge, I began to cross-examine the attorneys, finding out who did what. "Did the attorney do the fees? Did, did the attorney do the research? Did a clerk do the research? And if so, how much do she make?" I'm trying to find out: "How did you come up with these figures? How are they so close?" Well, the judge stopped me. He said that, you know, he felt like that I was battering the, the witness. And he said he would throw me in jail if I continued, and so I, I stopped. One of the things that the attorneys did do—an Aimee Szygenda and a Michael Woodson—they told the trial court that they had actual caselaw that said that a person who is indigent in a civil case would have to pay attorneys' fees. Well, I did all my research, and though I don't have but three hours, you know, I still did my research, and I couldn't find it. And when they filed their brief, I couldn't find it because they told the court something that wasn't true. The judge did not even want to see it. He says, "I accept it." He granted them new attorneys' fees based on what their arguments were, based on what they said, because they are attorneys. I'm going to cite just a few things to the court: *McMurry [vs.] McMurry* that the willful giving of false testimony by a party to an action in relationship to a matter affecting an issue to be tried is fraud. And also, in common with all other courts, they have the power when a judgment, order, or decree has been entered without jurisdiction or in this particular case that I'm arguing, or when obtained by fraud or such means are held, render the judgment, orders, decrees void. And that's *Heath vs.*, *Heath et al vs. Lane*. This case is very important to indigent people like me. The, the appellees argue that, "Well, if you, if you let this go, then, I mean, you'll have indigent people filing all kind of pleadings, and we won't be able to get our attorneys' fees." Well, that same argument, I'm sure, was possibly thought of many years ago when we said that indigent parties didn't have to pay their filing fees. We're indigent. We try to do the best that we can. I tried to hire an attorney. This is a very specialized type of law when we're talking about credit. It is, it is not like anything else I've ever dealt with before, and I did the best that I could. But as an indigent person who, the money that I get every

month doesn't even pay all the bills and I'm always short-falling from it, this court decision will set the pace for all other courts to look at, for all other indigent people everywhere. And I ask this court that this, in this particular instance, that indigent people should have a right to file in a court of law. They should have a right to, to do the best that they can, but if they cannot, but they cannot pay thousands of dollars of attorneys' fees. And I didn't have to be here today. I didn't have to. I could have found a way out of it, but this is so important for other indigent people that's out there, that's trying also to do the best that they can, your Honors, to represent themselves in a court of law. As I looked at my credit, there were things on there that was not even close to being, that I, that should be on there for me. And I did the best that I could. I'm not going to stand here and argue of no other points because I believe that this case is really centered on these two points: Indigent people who've been inducted as an indigent, approved as an indigent person in the trial court, in the appellate court, should not be made to pay attorneys' fees. And 91a should not have anything to do with that or superseding that. And when a judge in a trial court grants attorneys' fees based upon misrepresentation or fraudulent behavior, that order should be void. Thank you.

JUSTICE MEIER: I have a question, Mr. Drake.

MR. DRAKE: Yeah?

JUSTICE MEIER: I PULLED THE PLEADINGS THAT WERE FILED IN THIS CASE, AND I WANT TO BE CAREFUL THAT, THAT IT'S CORRECT IN WHAT IS SAID IN THE BRIEFING THAT WAS FILED, THAT THERE ARE TWO PLEADINGS THAT YOU FILED PRO SE IN THIS CASE. ONE'S CALLED THE PLAINTIFF'S ORIGINAL PETITION. THAT WAS FILED ON JULY THE 11TH OF 2013.

MR. DRAKE: Yes, Sir.

JUSTICE MEIER: AND THEN THERE WAS A, A PLAINTIFF'S FIRST MOTION TO AMEND PLEADINGS. THAT WAS FILED ON JULY 31ST OF 2013.

MR. DRAKE: Yes, Sir.

JUSTICE MEIER: AND THOSE ARE THE TWO PLEADINGS YOU FILED IN THIS CASE. ISN'T THAT CORRECT?

MR. DRAKE: Yes, Sir. It is.

JUSTICE MEIER: ALL RIGHT. I JUST WANTED TO BE CAREFUL I HAD THOSE DOWN. NOW, YOU UNDERSTAND THAT THE STATUTES THAT

ARE PASSED BY THE LEGISLATURE ARE THINGS THAT GOVERN WHAT A COURT CAN DO IN TERMS OF A COURT'S DECISIONS, HOW WE'RE BOUND AS JUDGES TO FOLLOW THE LAW AND NOT TRY TO MAKE IT AND WHENEVER WE HAVE A CLEAR INDICATION OF WHAT THE LAW SAYS, THAT BECOMES WHAT IT IS THAT WE'RE SUPPOSED TO DO AS JUDGES ON THE APPELLATE COURT IN RULING ON OUR CASES, AND YOU UNDERSTAND THAT PRINCIPLE, DON'T YOU?

MR. DRAKE: I do.

JUSTICE MEIER: AND DO YOU ALSO UNDERSTAND THAT THE ORDERING OF ATTORNEY'S FEES IN A TRIAL COURT IS A FUNCTION OF THE TRIAL JUDGE'S FOLLOWING WHAT HE BELIEVES TO BE THE LAW, THEN IT BECOMES OUR DUTY TO INTERPRET WAS THAT CORRECT IN WHAT HE DECIDED THE LAW WAS.

MR. DRAKE: Yes, Sir.

JUSTICE MEIER: AND THERE'S NOT, BY VIRTUE OF THE PROVISIONS IN RULE 91, ALL OF THEM, INCLUDING 91[a].7 ABOUT THE ATTORNEYS' FEES, THAT'S NOT PREVENTING A PERSON WHO IS INDIGENT FROM FILING A LAWSUIT. DO YOU UNDERSTAND THE FACT THAT EVEN IF THEY'RE GOING TO, IF THEY COME IN LATER AND SAY, "OKAY, YOU'VE GOT TO PAY ATTORNEYS' FEES," THAT'S STILL NOT KEEPING AN INDIGENT PERSON IN THE STATE OF TEXAS FROM FILING A LAWSUIT. YOU CAN GO TO COURT AND FILE A LAWSUIT IF YOU JUST PAY THE FILING FEE, OR YOU CAN BE DECLARED INDIGENT AND DON'T EVEN HAVE TO PAY THAT.

MR. DRAKE: Right.

JUSTICE MEIER: AND, SO, THIS RULING, WHATEVER RULING WE DO IN THIS CASE, IS NOT GOING TO PREVENT AN INDIGENT PERSON FROM FILING LAWSUITS IN, IN THE STATE OF TEXAS.

MR. DRAKE: Yes, Sir. And I understand that.

JUSTICE MEIER: OKAY.

MR. DRAKE: But what it will do, though, it, a 91a is used as a club by a defense attorney to dispose of a case quicker than a summary judgment. And, so, what it would do, I think, it would allow that defense attorney to constantly use this to say that, "He can't prove any of these facts; it's, it's frivolous or whatever," even before we get into the discovery, even before we get to a point where that, you

know, this case could be developed. And that's the reason why this case is very important. No, it's not stopping me from filing an initial case. But I don't believe that from the caselaw that I cited in my brief, where that time and time and time and time again, including this court, courts have, have ruled that if the person is indigent, he's indigent. 91a doesn't say anything about an indigent party.

JUSTICE MEIER: AND I WANT TO ASSURE YOU THAT I'VE READ YOUR BRIEF THOROUGHLY AND THE CASES YOU'VE CITED, SOME OF THE CASES YOU'VE CITED, ALL OF THE ONES THAT WERE RELEVANT TO THE POINTS THAT YOU ASKED. AND SO THIS COURT HAS GIVEN DUE CONSIDERATION TO THE FILINGS THAT YOU'VE GIVEN, THAT YOU'VE FILED IN OUR COURT, AND I WANT YOU TO KNOW THAT. AND I APPRECIATE YOU COMING HERE AS A PRO SO LITIGANT AND DOING THE BEST YOU CAN.

MR. DRAKE: Well, I do appreciate that then. Thank you, Justice. Any other questions?

JUSTICE GABRIEL: THANK YOU.

MR. DRAKE: Thank you.

JUSTICE MEIER: THANK YOU.

MR. STEVENS: May it please the Court . . .

JUSTICE MCCOY: WELL, LET ME START YOU OFF WITH A QUESTION.

MR. STEVENS: Sure.

JUSTICE MCCOY: WHAT ABOUT D.T.P.A. CASES, AND BREACH OF CONTRACT CASES, AND SUCH, WHERE THE TRIAL COURT CAN AWARD ATTORNEYS' FEES TO THE LOSING PARTY? WHAT DO CASES SAY ABOUT THE INDIGENCY OF THOSE PARTIES AGAINST WHOM ATTORNEYS' FEES ARE AWARDED?

MR. STEVENS: Those cases allow attorneys' fees to be awarded against an indigent party. In fact, sanctions can also be awarded against an indigent party.

JUDGE MCCOY: OKAY.

MR. STEVENS: This case is . . . my name's Gregg Stevens, and I'm representing Chase Bank, Chase Bank U.S.A. in this particular case. Rule 91a is, is very clear and very concise. The court must, the statute says and the

Texas Rules of Civil Procedure say: The court must award the prevailing party all costs and reasonable attorneys' fees incurred with respect to the challenged cause of action. There's two exceptions that were built into the rule. One is for governmental entities and one is for public, public officials in their official capacity, which is not the case here. Being indigent is not an exception. The statutes mean what they say. Section 312.002 of the Texas Government Code specifically states that words should be given their ordinary meaning. Must means must. In this particular case, the court properly awarded Chase its attorneys' fees. I've read the cases that were cited by appellant. And I understand he's pro se, and he's done, I think, a fine job. However, all those cases that are, that he is citing, where attorneys for someone who was indigent, did not have to pay attorneys' fees, were criminal cases, which are governed by the Code of Criminal Procedure. It's not, those are not applicable to civil cases and one of the main reasons we are comparing apples and oranges in this particular case. In this particular case, Mr. Drake, or the appellant in this case, purposely availed himself of the District Court in Denton County, Texas. I can't speak for all criminal cases, but one would safely assume that the criminal defendant is not there voluntarily. The cases he cites where he doesn't have to pay attorneys' fees are for the court-appointed attorneys that the court appoints to represent a criminal defendant. That has nothing to do with this particular case, where Mr. Drake filed the lawsuit; a Rule 91a motion was filed; and the Court, after giving it consideration, granted it. Therefore, the, we, Chase would request that this court affirm the award of its attorneys' fees and the granting of attorneys' fees against the appellant in this case. The, the, the court also, the trial court also considered the evidence to the amount of fees. Mr. Drake had the opportunity, the appellant in this case, to cross-examine the witnesses. And, after hearing the testimony of the attorneys, the, the trial court actually reduced the fees that were awarded against Mr. Drake. He reduced them from a \$4,000 request on behalf of Chase to \$2,480. And the trial court basically indicated on the record that he took into consideration Mr. Drake's pro se status. He didn't have discretion, and the statute does not give him discretion, to award, to not award attorneys' fees. He had certainly a discretion in the amount, and he awarded a lesser amount than we were seeking and, for the record, Chase is not appealing the reduction in the award. In addition, Rule 91a states that fees must be awarded on a challenged cause of action. The, the motion for reconsideration was part of the challenged cause of action. It didn't make any sense, and the statute does not make any sense, to allow fees for the initial hearing but not allow fees for the motion for reconsideration, where the appellant in this case dragged everybody back up to the courthouse for another bite at the apple. So, in conclusion, it is Chase, Chase's position that the attorneys' fees, the court properly awarded attorneys' fees, properly dismissed Mr. Drake's, or the appellant's, case under Rule 91a for failure to state a cause of action. And part of the statute is clear, and part of the reason why this rule was put into effect is so courts can dispose of meritless claims fairly quickly and efficiently. If the

case, if he had pled other causes of action, the attorneys wouldn't have filed the Rule 91a motion. That was not, that was not the case here. It doesn't bar indigent plaintiffs from the courthouse, but maybe it will make them potentially think twice before they file a cause of action that has no basis in law and no basis in fact. Therefore, Chase respectfully requests that this Court affirm the judgment of the Denton County, Denton District Court, in all respects. Thank you.

JUSTICE MCCOY: THANK YOU. REBUTTAL?

MR. DRAKE: I will make a very quick rebuttal, your Honor, in the fact that most of what the appellees' attorney said was true, with the exception that I did not have an opportunity to properly examine the attorneys. The judge stopped me. I have taken twenty-seven depositions so far in my lifetime. I'm very good at examining a person. I know what questions to ask and not ask. And I was getting to the point: "How did you come up with this figure? How did you come up with these figures? How come, how come they're so close together? Did you guys talk with each other and say, 'Hey, this is what we're going to file?'" So they did, I did not have an, an opportunity to really thoroughly examine them. The court wouldn't let me. And if you send it back, the court still won't let me. The court just ignored me because I am pro se. Now, I again say to the court that I've heard what the appellee said in regards to the 91a, the language in it, but I still affirm to this court that as an indigent party, to bill, being faced with \$4,000 of attorneys' fees would be overwhelming and that if you've not had a chance to thoroughly examine the witnesses, to do what you need to do to show a case, and when attorneys are giving false information to the judge and he accepts it because they're officers of the court, these are the two issues that I think this case represents. Thank you.

JUSTICE MCCOY: ALL RIGHT. THANK YOU. YOUR CASE IS SUBMITTED, AND Y'ALL ARE BOTH DISMISSED. WE'LL NOW CALL THE SECOND.